

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2012 MSPB 78

Docket No. SF-0752-09-0327-I-5

**Lawrence F. Sherman,
Appellant,**

v.

**United States Postal Service,
Agency.**

July 5, 2012

Lawrence F. Sherman, University Place, Washington, pro se.

Michael R. Tita, Esquire, Seattle, Washington, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant petitions for review of an initial decision that dismissed his refiled appeal as untimely, with no good cause shown for the delay. For the reasons discussed below, we GRANT the appellant's petition under [5 C.F.R. § 1201.115](#), VACATE the initial decision, and REMAND the appeal to the Western Regional Office for further adjudication.

BACKGROUND

¶2 The appellant filed a timely appeal of his January 23, 2009 removal from his position as a PS-06 General Clerk for Making False Representations of Material Facts to Obtain Unemployment Compensation. Initial Appeal File,

MSPB Docket No. SF-0752-09-0327-I-1 (IAF-1), Tab 1. The agency moved to dismiss the appeal without prejudice because the appellant had been charged with theft in the first degree in a criminal case and the charge in that case was based on the same conduct that led to the appellant's removal. IAF-1, Tab 6. In a March 23, 2009 initial decision, the administrative judge dismissed the appeal without prejudice to refiling within 30 days of a disposition of the criminal matter or no later than August 3, 2009. IAF-1, Tab 7 at 2.

¶3 The appellant refiled his appeal with the Board on August 27, 2009.¹ IAF-2, Tab 1. The administrative judge issued an order in which she informed the appellant that it appeared that his petition to refile was untimely and ordered him to file evidence and argument showing that his appeal was timely filed or that good cause existed for the delay. IAF-2, Tab 2 at 2. In response, the appellant asserted that he believed the deadline for refiling his appeal was 30 days from the disposition of the criminal matter, which occurred on July 29, 2009, when he asked to participate in a pretrial diversion program. IAF-2, Tabs 4, 7; *see also* Initial Appeal File, MSPB Docket No. SF-0752-09-0327-I-4 (IAF-4), Tab 11 at 11.

¶4 The appellant did not complete the program, however, and the criminal charges were reinstated on September 24, 2009. IAF-2, Tabs 7, 10, 12; IAF-4, Tab 11 at 14. The appellant then moved to dismiss the appeal without prejudice because the criminal matter was still pending. IAF-2, Tab 10. In an October 21, 2009 initial decision, the administrative judge dismissed the appeal without

¹ Although the Board date stamp on the fax cover sheet for the refiled appeal indicates that the Western Regional Office received it on August 28, 2009, *see* Initial Appeal File, MSPB Docket No. SF-0752-09-0327-I-2 (IAF-2), Tab 1 at 1, the date stamp created during faxing on the top of the document indicates that it was sent on August 27, 2009. *Id.* Moreover, the administrative judge acknowledged August 27, 2009, as the date of filing. IAF-2, Tab 2 at 2.

prejudice to refiling but did not address the timeliness issue.² IAF-2, Tab 13. The administrative judge directed the appellant to refile his appeal “within 30 days of a disposition of the criminal matter (by acquittal, guilty plea, guilty verdict, plea bargain, diversion program, etc.)³ or under no circumstances later than **January 4, 2010.**” *Id.* at 2 (emphasis in original) (footnote added).

¶5 The appeal was timely refiled and dismissed without prejudice twice more to permit the completion of criminal proceedings. Initial Appeal File, MSPB Docket No. SF-0752-09-0327-I-3 (IAF-3), Tabs 1, 8; IAF-4, Tabs 1, 12. In the fourth initial decision, dated September 30, 2010, the administrative judge ordered the appellant to refile his appeal “within 30 days of a disposition of the

² In the initial decision currently under review, the administrative judge stated that she found good cause for the appellant’s prior untimely filing of August 27, 2009, “[b]ased on the appellant’s pro se status [and] his assertions as to his misunderstanding and confusion regarding the time he was to refile his appeal” Initial Appeal File, MSPB Docket No. SF-0752-09-0327-I-5 (IAF-5), Tab 7, Initial Decision (ID) at 3. Based on our review of the record, however, it appears that, while the administrative judge’s October 21, 2009 initial decision dismissed the appeal without prejudice because of the pending criminal proceedings, she did not make any findings as to whether there was good cause for the filing delay, nor did the administrative judge otherwise address the apparent untimeliness of the refiled appeal in that initial decision. *See* IAF-2, Tab 13. We further note that, in the agency’s response to the timeliness order during the proceedings below, the agency’s representative stated that the administrative judge’s October 21, 2009 initial decision did not decide the timeliness issue because the criminal charges against the appellant had been reinstated due to the appellant’s failure to complete the diversion program. IAF-5, Tab 5 at 7.

³ We note that, under Board precedent, some of the actions the administrative judge cited in her October 21, 2009 initial decision do not constitute a “disposition of the criminal matter” so as to trigger a refiling deadline. For example, the Board has held that a guilty plea is not a conviction or judgment that signals the disposition of a criminal charge. *See Nelson v. U.S. Postal Service*, [113 M.S.P.R. 644](#), ¶ 6 (2010) *aff’d*, *sub nom. Nelson v. Merit Systems Protection Board*, 414 F. App’x 292 (Fed. Cir. 2011); *see also Taylor v. Department of the Air Force*, [89 M.S.P.R. 402](#), ¶¶ 6-8 (2001) (finding that the appellant’s entry into a pre-trial probationary program did not constitute the “disposition of criminal charges” for purposes of determining the refiling date because the court did not enter judgment or obtain a conviction and the appellant remained subject to prosecution and sentencing subject to successfully completing the program).

criminal matter or no later than **March 1, 2011**, even if the criminal matter is unresolved.” IAF-4, Tab 12 at 3 (emphasis in original).

¶6 The appellant refiled his appeal on February 25, 2011. IAF-5, Tab 1. In his appeal, the appellant stated that the criminal matter had been heard and he was currently “in the appeal process.” *Id.* at 7. During a March 30, 2011 status conference, the agency’s representative raised the issue of timeliness, stating that the jury in the criminal matter had issued a guilty verdict on November 5, 2010. IAF-5, Tab 4 at 1. The administrative judge then issued an order advising the appellant of his burden to show that his appeal was refiled on time or that good cause exists for the delay. *Id.* at 1-2. Both parties filed responses to the order. IAF-5, Tabs 5, 6. In his response, the appellant argued that, because he had filed an appeal of his conviction, the criminal matter was “still on-going [sic]” despite the jury verdict and, therefore, he believed that the March 1, 2011 refiling deadline applied. IAF-5, Tab 6 at 1.

¶7 The administrative judge issued an initial decision in which she dismissed the appeal as untimely refiled, finding that the appellant did not establish good cause for the delay in refiling his appeal. *ID* at 6-7. The administrative judge found that, while the appellant’s pro se status and the timely filing of his initial appeal weighed in his favor, these factors did not overcome the fact that he was expressly put on notice as to when the appeal had to be refiled to be timely, as he had been explicitly advised that “disposition of the criminal matter” included a guilty verdict. *Id.* The administrative judge further found that the 81-day refiling delay is not minimal and does impact the agency. *Id.* at 7.

¶8 The appellant has filed a petition for review, in which he reasserts his argument that, because the criminal matter is “in the appeal process,” it is unresolved and, therefore, the deadline for refiling his appeal was March 1, 2011. Petition for Review (PFR) File, Tab 1. He further asserts that the administrative judge “never once uttered a word about the case being unresolved or explained

what that meant.” *Id.* at 2. The agency has filed a response to the petition for review.⁴ PFR File, Tab 3.

ANALYSIS

¶9 The Board has held that its dismissal without prejudice practice should not become a trap to deny an appellant the opportunity to have his case decided on the merits. *Jaramillo v. Department of the Air Force*, [106 M.S.P.R. 244](#), ¶ 6 (2007). The Board has also found that an appellant should not be denied the opportunity to have his appeal heard on the merits where, as here, his intention to refile a Board appeal has been clear throughout the proceedings and the appeal was initially timely filed. *Id.*; *Hodges v. Office of Personnel Management*, [101 M.S.P.R. 212](#), ¶ 12 (2006); *Shenwick v. Department of State*, [90 M.S.P.R. 192](#), ¶ 9 (2001); *Jackson v. Office of Personnel Management*, [89 M.S.P.R. 302](#), ¶ 10 (2001). Accordingly, the Board has identified specific standards for determining whether good cause exists for excusing an untimely refiled appeal of a matter previously dismissed without prejudice. *See Nelson*, [113 M.S.P.R. 644](#), ¶ 8. These include the following: the appellant’s pro se status; the timeliness of the initial appeal; the appellant’s demonstrated intent throughout the proceedings to refile the appeal; the length of the delay in refiling; confusion surrounding and arbitrariness of the refiling deadline; the number of prior dismissals without prejudice; the agency’s failure to object to the dismissal without prejudice; and the lack of prejudice to the agency in allowing the refiled appeal.⁵ *Id.*

⁴ The appellant filed a reply to the agency’s response to the petition for review, and the agency filed an objection and response to the appellant’s reply, requesting that the appellant’s reply be stricken from the record. PFR File, Tabs 4, 5. We have not considered the appellant’s submission because the Board’s regulations do not provide for submissions beyond the petition for review and the opposing party’s response. [5 C.F.R. § 1201.114\(b\)](#).

⁵ As the administrative judge noted in the initial decision, her timeliness order did not provide the appellant with notice of the proper standard for determining whether the appellant established good cause for a delay in refiling an appeal. *Id.* at 6; *see* IAF-5,

¶10 We note that certain factors weigh against the appellant, notably the number of prior dismissals without prejudice (four) and the 81-day refiling delay in the present case, which is considerably longer than the delay in cases where waiver of the deadline was deemed justified. *See, e.g., Jaramillo*, [106 M.S.P.R. 244](#), ¶ 7 (29 days); *Hodges*, [101 M.S.P.R. 212](#), ¶ 10 (23 days); *Shields v. Department of the Navy*, [91 M.S.P.R. 347](#), ¶ 9 (2002) (4 days); *Shenwick*, [90 M.S.P.R. 192](#), ¶¶ 7-11 (16 days); *Jackson*, [89 M.S.P.R. 302](#), ¶¶ 6-10 (8 days).

¶11 Nonetheless, we find that the appellant established good cause for the delay in refiling his appeal because other factors weigh decisively in his favor. The appellant was pro se, timely filed his initial appeal, and did not indicate any intention to abandon his appeal. In that regard, we note that the appellant filed a petition for review of the third initial decision that dismissed his appeal without prejudice, asking the Board to decide the appeal on the merits.⁶ PFR File-3, Tab 1.

¶12 Moreover, the agency did not object to the most recent dismissal without prejudice. In fact, in three of the four instances in which this appeal has been dismissed without prejudice to refiling, including the last two, the agency filed the motion to dismiss. *See* IAF-1, Tab 6; IAF-3, Tab 7; IAF-4, Tab 11. Also, while the administrative judge found that the refiling delay impacts the agency, ID at 7, the agency has not asserted that it would be prejudiced in allowing the refiled appeal to proceed.

Tab 4 at 2. This error did not affect the outcome, however, as the administrative judge considered the proper factors in the initial decision. ID at 6; *see Ballesteros v. U.S. Postal Service*, [88 M.S.P.R. 428](#), ¶ 6 (2001) (an earlier failure to provide accurate notice concerning what is required to establish jurisdiction may be corrected in the initial decision).

⁶ The Board denied the petition for review by nonprecedential final order because the appellant had refiled his appeal while the petition for review was pending before the Board, thereby rendering the issue of the dismissal moot. Petition for Review File, MSPB Docket No. SF-0752-09-0327-I-3 (PFR File-3), Tab 4.

¶13 Another factor weighing heavily in the appellant's favor is confusion surrounding the refiling deadline. In the initial decision, the administrative judge identified two possible deadlines for refiling the appeal: (1) within 30 days of the disposition of the criminal matter; or (2) March 1, 2011, even if the criminal matter was not resolved. ID at 7. As this case illustrates, however, the disposition of the criminal matter is not necessarily synonymous with the resolution of the criminal matter. The guilty verdict in the criminal trial constituted a disposition of the criminal matter pursuant to the definition of that term set forth in the administrative judge's October 21, 2009 initial decision. IAF-2, Tab 13 at 2. Because the appellant was appealing his conviction, however, the criminal matter had not necessarily been "resolved." In light of the wording of the refiling instructions, we understand how the appellant may have believed that, because he had appealed his conviction, the criminal matter was unresolved and, therefore, the March 1, 2011 deadline applied. Consequently, we find that the filing deadline should be waived.

ORDER

¶14 We REMAND this appeal to the Western Regional Office for adjudication.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.